FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 17, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2001-585-M
v.	:	A.C. No. 26-02418-05504
PASCO GRAVEL COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 27, 2001, the Commission received from Pasco Gravel Company ("Pasco Gravel") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

Pasco Gravel's request to reopen was submitted by Rocco Pasquarello, the company operator. Mot., attachs. He asserts that Pasco Gravel failed to timely submit a request for a hearing on the proposed penalty assessment to the Department of Labor's Mine Safety and Health Administration ("MSHA") because the company was never notified about the proposed assessment until he complained to an MSHA supervisor that an MSHA inspector had gone to his home and told his wife about the violations and upset her. *Id.* Pasquarello contends that he twice requested a hearing by phone with the MSHA supervisor concerning the violations. *Id.* He

further maintains that Pasco Gravel was never in violation and that the MSHA inspector who cited the company had no experience in gravel operations. *Id.* Pasco Gravel is apparently proceeding pro se. Copies of the relevant citations were attached to its request to reopen.

The Secretary does not oppose Pasco Gravel's request to reopen but maintains that the proposed penalty assessment was sent to Pasquarello's home address by certified mail and was returned unclaimed. Sec'y Ltr. dated Sept. 7, 2001. She attached a copy of the certified mail receipt indicating that the proposed assessment was returned unclaimed. *Id.*, attach. The Secretary contends that, because the proposed assessment was returned unclaimed, the inspector called Pasquarello's wife and received her permission to visit her home to discuss the proposed assessment. *Id.* The Secretary maintains that the inspector's behavior was entirely appropriate and was an attempt to ensure that Pasquarello had notice of the assessments. *Id.*

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.,* 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Pasco Gravel's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See D.A.S. Sand & Gravel, Inc.*, 23 FMSHRC 1031, 1031-33 (Sept. 2001) (remanding to judge to determine whether relief from final order was appropriate where operator alleged that it never received copy of the proposed penalty assessment); *Carri Scharf Materials, Co.*, 23 FMSHRC 813, 813-16 (Aug. 2001) (same); *Baker Slate, Inc.*, 23 FMSHRC 818, 818-820 (Aug. 2001) (remanding to judge where operator was

apparently confused about Commission procedures and mistakenly thought it had to contact specific MSHA official before making hearing request). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

I would grant Pasco Gravel's request for relief. First, I note that the Secretary does not oppose Pasco Gravel's motion. I also note that the company is proceeding pro se, and the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Nor do I find any other circumstances that would render a grant of relief here problematic. Under these circumstances, I thus fail to see the need or utility for remanding this matter.

Theodore F. Verheggen, Chairman

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